

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. The Board finds claimant is entitled to benefits based on a 5 percent disability while he remained employed for respondent at a comparable wage and then has a work disability. The Board finds claimant failed to prove a task loss percentage but has a 100 percent wage loss and, therefore, has a 50 percent work disability.

Findings of Fact

1. Claimant injured his back at work on October 3, 1997. Respondent has stipulated the injury arose out of and in the course of claimant's employment.
2. Respondent referred claimant to Dr. G. Garcia. Dr. Garcia took claimant off work for six weeks and then released claimant to return to work with restrictions. Claimant understood the restrictions to limit his lifting to not more than 50 pounds and to avoid bending and stooping. Claimant testified to these restrictions over the hearsay objection by respondent's counsel. Although respondent was aware of these restrictions, claimant's job required that he exceed those restrictions, and respondent made no accommodation.
3. In March 1998, claimant requested additional medical treatment and was sent again to Dr. Garcia. Dr. Garcia suggested claimant see a physiatrist and respondent referred claimant to Dr. J. Raymundo Villanueva. Claimant continued to work while seeing Dr. Villanueva. Dr. Villanueva released claimant in September 1998 and also recommended restrictions. Dr. Villanueva's restrictions were similar to Dr. Garcia's. He recommended claimant limit lifting to 50 pounds and also recommended restricting stooping and bending.
4. On December 14, 1998, respondent advised claimant he was being laid off for economic reasons. Two other persons were laid off at the same time, but claimant was the only one laid off from operations. The other two were in the bulk plant. Claimant thereafter sought to return to work for respondent but was not rehired. Two persons, not laid off at the same time, were returned to work.
5. At the direction of the Administrative Law Judge, claimant's injury was evaluated by Dr. C. Reiff Brown. Dr. Brown diagnosed degenerative condition of the lumbar spine aggravated by the work injury. He rated the impairment as 5 percent of the whole person. He recommended claimant permanently avoid lifting above 75 pounds occasionally, 40 pounds frequently, do all lifting with proper body mechanics, and avoid frequent flexion past 30 degrees.
6. The tasks claimant performed in his work for respondent required that he lift up to 100 pounds. The tasks that required this lifting were identified as over 40 percent of the day in the list prepared by Ms. Karen C. Terrill. No physician gave a task loss opinion based on Ms. Terrill's list.

7. Claimant also introduced a task list prepared by claimant's wife based on information from claimant. The list covers the 12 ½ year period from July 1986 to December 1998. Dr. Brown gave a task loss opinion based on this list but also testified to several problems with the list. As he noted, several of the identified tasks involve what appears to be several tasks and in some cases the same activities are identified more than once as a separate task. The list describes the physical requirement of the task and, on several occasions, uses the label "excessive" to describe the requirement. The description may, for example, say the task requires "excessive" bending or "excessive" twisting. Dr. Brown assumed this meant frequent. Finally, as noted, the task list does not cover the entire 15 years before the October 3, 1997, date of accident. The 15 years would begin October 3, 1982. The record otherwise reflects that claimant worked in Mexico between 1983, after finishing welding school, and going to work in the United States in 1986 but does not establish the tasks he performed. Ms. Terrill's list contains one job from 1983 as a welder's helper, but claimant testified that he ran his own welding shop during this period, and the record contains no description of the tasks in that job.¹

8. After being laid off by respondent, claimant kept in touch with respondent and requested employment. Claimant also applied for work at numerous other places listed in an exhibit to the regular hearing. When efforts to find employment were unsuccessful in Johnson and Ulysses, Kansas, claimant moved to New Mexico, hoping to find work there. A list of the places claimant applied after moving in July 1999 is also included in that same exhibit. Based on claimant's testimony and the list of places applied, the Board finds claimant has made a good faith effort to find employment since being laid off by respondent.

Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1997 Supp. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

¹ Respondent also disputes the weights claimant shows he lifted, but the weights are not inconsistent with the weights shown in Ms. Terrill's list and nothing in the record contradicts claimant's evidence on this point.

3. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. In this case, claimant continued to work for respondent at the same job from the stipulated date of accident, October 3, 1997, through December 14, 1998, when he was laid off. During that period claimant is limited to disability based on functional impairment.

6. The Board finds claimant's functional impairment to be 5 percent based on the rating by Dr. Brown.

7. The Board finds claimant is entitled to a work disability beginning December 14, 1998. The Board does not find, as claimant argues, that the layoff was merely a pretext to terminate claimant. The evidence does not, in our view, prove that to be true. We know claimant was laid off with two other people and that thereafter some employees, apparently laid off at some other time, were reemployed. We cannot assume from these limited facts that claimant was laid off or not reemployed because of his injury or workers compensation claim. The Board nevertheless concludes claimant should receive work disability after the layoff.

Respondent argues this case is analogous to *Watkins v. Food Barn*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997). In that case, the Court of Appeals held, based on a pre-1993 definition of work disability that used only loss of ability criteria, that a claimant who returned to an unaccommodated job paying a comparable wage would not be entitled to work disability if laid off for economic reasons. The *Watkins* case distinguished *Lee v. Boeing*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). In the *Lee* case, the court had held that a person who is laid off from a postinjury accommodated job is entitled to work disability. The *Lee* case is, again, based on a pre-1993 measure of work disability that looks only to the claimant's ability.

The Board does not consider this case factually identical to either *Lee* or *Watkins*. But we do find that because of his injury, as in *Lee*, the job with respondent was no longer appropriate for claimant. The job violated restrictions recommended by three treating physicians—Dr. Garcia, Dr. Villanueva, and Dr. Brown.

Respondent has argued that the restrictions from Dr. Garcia and Dr. Villanueva are not in evidence because neither physician testified. But claimant testified to both sets of restrictions, and claimant's testimony as to the restrictions is consistent with the restrictions shown in the report from Ms. Terrill. Based on this evidence, the Board concludes the record establishes that the work claimant performed for respondent violated restrictions by both Dr. Garcia and Dr. Villanueva. Dr. Brown did testify, and the work also exceeded his recommended restrictions.

Respondent counters that regardless of the restrictions, claimant established he could perform the work because he actually did perform the work without accommodation from October 3, 1997, to December 14, 1998. In some cases where the claimant demonstrates a consistent ability to perform a particular type of work over an extended period, the Board has found that a particular set of restrictions against such work was not appropriate. This is the conclusion respondent urges here. But claimant sought medical attention in the spring of 1998. He was having problems and although he continued to work, he was receiving medical care throughout much of the last year of his employment. The Board concludes that the work was inappropriate for one with his injury. For this reason, the instant case differs from *Watkins*, and the Board concludes claimant should be entitled to work disability.

8. Although entitled to work disability, the Board concludes claimant has failed to meet his burden of establishing the extent of the task loss. The problems in claimant's proof are detailed in the above findings of fact. The combination of these problems makes, in our view, the task loss opinion unreliable. Of particular significance is the fact the list does not include jobs claimant performed. The loss is, under K.S.A. 44-510e, converted to a percentage. Without a complete list of tasks, the denominator for the fraction is unknown and the percentage cannot be calculated. The Board, therefore, considers the task loss to be 0 percent.

9. The Board concludes claimant has made a good faith effort to find employment since being laid off in December 1998. He has not found employment and the wage loss is, therefore, 100 percent.

10. The Board finds claimant has a 50 percent work disability based on a 0 percent task loss and a 100 percent wage loss.

11. Claimant's average weekly wage was \$837.63 until after he left employment with respondent on December 14, 1998. Thereafter, his average weekly wage includes the \$100 per week value of the terminated fringe benefits or additional compensation and is \$937.63.

12. As above found, claimant will receive benefits based on a 5 percent functional impairment for the period October 3, 1997, to December 14, 1998, and a 50 percent work disability thereafter. For the 5 percent, claimant will receive 20.75 weeks of benefits. The 50 percent work disability would entitle claimant to 207.5 weeks of benefits. The benefits paid

on the 5 percent are to be deducted from or credited against the benefits to be paid for the 50 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on January 5, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jose Alfredo Garcia, and against the respondent, Schlumberger Dowell, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred October 3, 1997, for 6 weeks of temporary total disability compensation at the rate of \$351 per week or \$2,106, followed by 20.75 weeks of permanent partial disability at the rate of \$351 per week or \$7,283.25, for a 5% disability based on functional impairment, followed by 186.75 weeks of permanent partial disability (207.5 less 20.75 paid for the 5% disability) or \$65,549.25, for a total award of \$74,938.50.

As of July 31, 2000, there is due and owing claimant 6 weeks of temporary total disability compensation at the rate of \$351 per week or \$2,106, followed by 141.43 weeks at the rate of \$351 per week in the sum of \$49,641.93, for a total of \$51,747.93 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$23,190.57 is to be paid for 66.07 weeks at the rate of \$351 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Liberal, KS
Gregory D. Worth, Lenexa, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director